

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GENEO ZAMORA,

Defendant-Appellant.

UNPUBLISHED

October 11, 2011

No. 299238

Genesee Circuit Court

LC No. 10-026226-FC

Before: MURPHY, C.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree felony murder, MCL 750.316, two counts of armed robbery, MCL 750.529, assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

Defendant first argues that the evidence that his sister pawned the stolen shotgun violated the Confrontation Clause and state hearsay rules. Unpreserved claims of constitutional error are reviewed for plain error effecting substantial rights. *People v Cairnes*, 460 Mich 750, 764; 597 NW2d 130 (1999); *People v Odom*, 276 Mich App 407, 421; 740 NW2d 557 (2007).

Admission of hearsay can implicate the Confrontation Clause, *People v Dendel (On Second Remand)*, 289 Mich App 445, 453; 797 NW2d 645 (2010), which guarantees the defendant the right to confront witnesses against him. US Const, Am VI; Const 1963, art 1, § 20; *Dendel*, 289 Mich App at 453. The Sixth Amendment bars “the admission of testimonial statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.” *Dendel*, 289 Mich App at 453.

Hearsay is “a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(c). Hearsay is generally inadmissible unless it falls within one of the hearsay exceptions. MRE 802; *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007). A statement can be an oral or written assertion or a nonverbal action if the action is intended to be an assertion. MRE 801(a). “Nonassertive conduct is not hearsay.” *People v Davis*, 139 Mich App 811, 813; 363 NW2d 35 (1984).

The act of pawning a shotgun is nonassertive conduct and therefore is not hearsay. *Davis*, 139 Mich App at 813. Moreover, admission of this evidence did not violate the Confrontation Clause because the act was not a testimonial statement. A statement is testimonial if “the declarant should reasonably have expected the statement to be used in a prosecutorial manner and if the statement was made under circumstances that would cause an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Dendel*, 289 Mich App at 453. The shotgun was not given to the police for the case, it was pawned. The nonassertive act was not a testimonial statement. No plain error occurred.

Next, defendant argues that the prosecutor committed misconduct by improperly impeaching Jackson, and then misusing the evidence as proof of defendant’s guilt instead of for impeachment purposes.

Preserved claims of prosecutorial misconduct are reviewed de novo, *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008), while unpreserved claims are reviewed for plain error. *Id.* The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Claims of prosecutorial misconduct are evaluated on a case-by-case basis, and the prosecutor’s remarks must be examined in context of the case. *Id.* at 64. It is not misconduct for a prosecutor to argue from the facts in evidence that a witness is not credible. *Id.* at 67.

“Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.” MRE 613(b). Extrinsic evidence of a prior inconsistent statement may be used to impeach a witness when the witness claims to not remember making the statement. *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995). However, the extrinsic evidence should not be used as substantive evidence. *Id.*

Jackson testified inconsistently with her prior statement to police, and the prosecutor gave Jackson a chance to explain the inconsistency. Defense counsel did not object to this impeachment, but did object when the prosecutor impeached Jackson through Coon’s testimony. Coon was questioned about Jackson’s statement during direct examination, and defense counsel objected on hearsay grounds. The trial court overruled the objection and Coon testified about what Jackson had told him in her prior statement. Defendant has failed to demonstrate how the prosecutor’s actions were improper, and the record shows that the prosecutor’s questioning comported with MRE 613(b).

Defendant also argues that the prosecutor committed misconduct by focusing on Jackson’s inconsistent statements during closing argument and rebuttal closing, and by using the evidence as substantive proof of defendant’s guilt instead of impeachment evidence. This argument is without merit. Defendant failed to object to the prosecutor’s remarks; therefore, our review is for plain error. *Brown*, 279 Mich App at 134.

During closing argument the prosecutor stated:

Now, ladies and gentlemen, the evidence suggests, based upon her [Jackson's] prior statement to Sgt. Terry Coon--which prior, Shaneka tells Sgt. Coon that back in September, 'Geneo didn't show up for the birthday party. Geneo didn't come to my apartment afterward, until I called him; and he still didn't show up. An hour passed, he still didn't show up. I'm getting a little angry. I'm in the bathroom. I come out.' There's Jason and Geneo with this big TV, and she's excited.

That's what she told Sgt. Coon in September. And because that fits with the evidence you know, based upon the evidence, she didn't tell you the truth when she testified regarding this. She didn't change her story until she came to court with Toriell Kidd that morning.

During rebuttal argument the prosecutor stated:

What makes sense is what she told Sgt. Terry Coon. That after--that Geneo didn't show up to Red Robin. After dinner Shaneka went home, cleaned her house. Torielle, LaTonya, Jaland, Quinjush, and Shaneka hung out in her apartment. Shaneka called Geneo and asked him to come home to visit with his cousin and their friends. He said, 'Okay. I'm on my way.'

An hour passed. Shaneka called him again. He says, 'I'm on--I'm with my aunt. I'll be there.'

Sometime after 11 p.m., Geneo and Jason showed up. They came in. Shaneka went to the bathroom. When she came out, all her friends were giggling and laughing. They said, 'Look what your boo got you. It's a big ass TV.'

The prosecutor continued:

The evidence in this trial--consistent with that first statement. And that shows that she lied to you. When Torielle Kidd brought her to court that day, she changed her story. Told Sgt. Terry Coon the truth, when she hadn't been through it before, when she was nervous, when she learned that this is a homicide and a critical shooting.

When she testified and lied, that shows Torielle Kidd's lying. That shows Jaland Moore's lying.

A prosecutor's remarks must be evaluated in light of the evidence and the arguments of defense counsel. *Dobek*, 274 Mich App at 64. It is proper for a prosecutor to argue from the facts in evidence that a witness is not credible. *Id.* at 67. The prosecutor's remarks on Jackson's credibility were proper and did not constitute misconduct.

Furthermore, the trial court instructed the jury as follows:

[i]f you believe that one of those witnesses previously made a statement, sometime before this trial, that is inconsistent with the testimony at this trial, the

only purpose for which that earlier statement can con--be considered by you is in deciding whether the witness testified truthfully in this court. Because the earlier statement is not evidence that what the witness said earlier is true.

A jury is presumed to follow its instructions. *People v Breidenbach*, 489 Mich 1, 13; 798 NW2d 738 (2011). The prosecutor's remarks were proper comment on Jackson's credibility, and the jury received an instruction regarding the proper evaluation of Jackson's statements. No plain error occurred.

Next, defendant argues that the jury was exposed to extraneous influences which rendered it unable to deliver an impartial verdict. Preserved constitutional issues regarding nonstructural errors are subject to the harmless error analysis. *People v Solomon (Amended Opinion)*, 220 Mich App 527, 535; 560 NW2d 651 (1996). A constitutional error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty. *People v Mass*, 464 Mich 615, 640 n 29; 628 NW2d 540 (2001). A defendant has the right to a fair and impartial jury and extraneous influences on the jury can deprive a defendant of this right. *People v Budzyn*, 456 Mich 77, 88, 89; 566 NW2d 229 (1997). It is up to the trial court to ensure that the jury is not exposed to outside influences that could affect the jury's ability to return an impartial verdict. *People v Jackson*, ___ Mich App ___, ___ NW2d ___ (Docket No. 285532, issued May 17, 2011), slip op, p 5. But a new trial will not be granted every time a juror is exposed to a potentially compromising situation. *Id.*

To prove that an extraneous influence prejudiced the jury, the defendant must:

prove that the jury was exposed to extraneous influences. Second, the defendant must establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict. Generally, in proving this second point, the defendant will demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict. [*Budzyn*, 456 Mich at 88-89 (internal citations and footnote omitted).]

If the defendant is able to make such a showing, the burden shifts to the prosecutor to prove that the error was harmless. *Id.*

During the trial the jury encountered a man in the hallway who would not move out of the way so that the jury could get to the deliberation room. The bailiff repeatedly requested that the man move, and eventually security was called and the man was arrested. During the hearing on defendant's motion for a new trial, the bailiff testified that the man did not communicate in any way or influence the jury. Defendant has failed to demonstrate that the jury's presence during the brief encounter with the man affected its verdict. Defendant has not demonstrated that the encounter was substantially related to a material aspect of his case, or that a direct connection existed between the encounter and the guilty verdict. *Budzyn*, 456 Mich at 89.

During jury deliberations, another altercation occurred between two individuals down the hall from the jury room. After the altercation took place a juror asked the bailiff what had happened. The bailiff testified that he told the jury that a minor incident had occurred and had

been addressed. In addition, before returning to the courtroom to deliver the verdict, a juror inquired about security. The bailiff told the jury that security would be present in the courtroom.

Defendant has failed to demonstrate that what the jury heard of the altercation was substantially related to a material aspect of his case. The altercation lasted less than one minute. The juror who asked about what happened did not indicate that the jury knew what was going on. We cannot assume that what the jury heard, if anything, affected its verdict. *Budzyn*, 456 Mich at 88-89. Defendant has not shown that either alleged external influence was error justified a new trial.

Defendant's next argument is that he was denied the right to a public trial when the trial court allowed only one member of the public, one from each party, to remain in the courtroom during the reading of the verdict.

Although every criminal defendant has the right to a public trial, US Const, Am VI; Const 1963, art 1, § 20, the right to a public trial is not self-executing so defendant must timely assert the right. *People v Vaughn*, ___ Mich App ___; ___ NW2d ___ (Docket No. 292385, issued December 28, 2010), slip op, p 7. If the defendant fails to assert the right to a public trial, then later relief is forfeited. *Id.*

Before the jury returned to the courtroom to read the verdict the trial court stated:

THE COURT: We're back on People versus Geneo Zamora, and--uh-- because of the disturbance that happened in the hallway, the Court has ordered that there will only be one representative of each side. So, all of you in the prosecutor's office that are not involved with this case will leave. Mr. Tesner, Ms. Christopherson, this gentleman; you'll all leave.

MR. EWING: That gentleman, Judge, was from my office. You said he was okay.

THE COURT: I don't care. I kicked prosecutors out--

MR. EWING: Okay. Okay.

THE COURT:--I'm kicking your people out, too.

MR. EWING: Fine. All right. That's fine.

Defendant did not object to the trial court's decision, and therefore forfeited any right to relief. *Vaughn*, ___ Mich App at ___ (slip op at 7).

In any event, during the hearing on defendant's motion for a new trial, the trial court gave the following reasons for its decision:

Mr. Ewing points out that the behavior of the members of the gallery was problematic and the Court only allowed two members of the public to be permitted to be present. Well, that was the Court's decision, and the jury didn't

know the Court was doing that, and the Court did it because of that incident that happened over in the District Courthouse. And the Court did it because the confrontation had occurred and at that point in time I didn't know why, so I just decided it was safer to only allow two members of the public to be permitted to be present.

The trial court justified its decision based on a concern for safety. Defense counsel acknowledged that some members of the gallery were problematic and the trial court had not yet determined the cause of the altercation that occurred while the jury was deliberating. The trial court was justified in limiting the gallery based on safety concerns, and defendant was not denied the right to a public trial.¹

Finally, defendant argues that his constitutional rights were violated by the bailiff's ex parte communications with the jury. Preserved constitutional issues regarding nonstructural errors are subject to a harmless error analysis. *Solomon*, 220 Mich App at 535. A constitutional error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty. *Mass*, 464 Mich at 640 n 29. An ex parte communication with the jury during deliberation does not require automatic reversal. *People v France*, 436 Mich 138, 163; 461 NW2d 621 (1990).

The reviewing court must first classify the communication and then decide if the communication was prejudicial to the defendant. *France*, 436 Mich at 166. If the reviewing court finds that the communication was prejudicial to the defendant then reversal is warranted. *Id.* at 163. There are three types of communications, substantive, administrative, and housekeeping. *Id.* The *France* Court described the types of communications and the type of prejudice associated with each:

Substantive communication encompasses supplemental instruction on the law given by the trial court to a deliberating jury. A substantive communication carries a presumption of prejudice in favor of the aggrieved party regardless of whether an objection is raised. The presumption may only be rebutted by a firm and definite showing of an absence of prejudice.

Administrative communications include instructions regarding the availability of certain pieces of evidence and instructions that encourage a jury to

¹ In the same context, defendant also argues that he was denied the right to counsel when the trial court allowed only one attorney from each side to be present during the reading of the verdict. We review this unpreserved assertions of constitutional error for plain error effecting substantial rights. *Cairnes*, 460 Mich at 764; *Odom*, 276 Mich App at 421. All criminal defendants have a constitutional right to counsel. US Const, Am VI; 1963 Const, art 1, § 20; *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004). Defendant's counsel was present throughout the trial, including the reading of the verdict. Although an individual from defense counsel's office was asked to leave the courtroom, the man was never identified and never offered an appearance for the record. Defendant was not denied the right to counsel.

continue its deliberations. An administrative communication has no presumption of prejudice. The failure to object when made aware of the communication will be taken as evidence that the instruction was not prejudicial. Upon an objection, the burden lies with the nonobjecting party to demonstrate that the communication lacked any prejudicial effect.

* * *

Housekeeping communications are those which occur between a jury and a court officer regarding meal orders, rest room facilities, or matters consistent with general 'housekeeping' needs that are unrelated in any way to the case being decided. A housekeeping communication carries the presumption of no prejudice. First, there must be an objection to the communication, and then the aggrieved party must make a firm and definite showing which effectively rebuts the presumption of no prejudice. [*Id.* at 163-164 (internal citations and footnotes omitted).]

Defendant maintains that the bailiff addressed the jury twice on an ex parte basis, first in response to a juror asking what had happened in the hallway, and second in response to a juror asking about security during the reading of the verdict.

Both communications appear to be housekeeping communications because they concerned general housekeeping matters that were unrelated to the case; therefore, no prejudice is presumed. *France*, 436 Mich at 164. The record does not reveal when the parties learned of the communications; however, defendant did move for a new trial based on the incidents.

Defendant must also "make a firm and definite showing which effectively rebuts the presumption of no prejudice." *France*, 436 Mich at 164. Defendant has failed to do so, as he fails to recognize that these communications were housekeeping matters, and fails to demonstrate how those communications were prejudicial. The bailiff's communications were not prejudicial ex parte communications, defendant's constitutional rights were not violated and he was not entitled to a new trial.

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Talbot
/s/ Christopher M. Murray